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In the Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER, ET AL., PETITIONERS

v.

HONORABLE ZELL D. MILLER, GOVERNOR OF GEORGIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether Section 21-2-140(b) of the Georgia Annotated Code (Michie 1993), which provides that "[e]ach candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs," violates petitioners' Fourth Amendment rights.

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INTEREST OF THE UNITED STATES

Although there is no federal statute or law requiring that candidates for any elective office submit to urinalysis drug testing, the federal government does require drug testing in a variety of contexts.[1] The

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[1] See, *e.g.*, *NTEU* v. *Von Raab*, 489 U.S. 656 (1989) (drug testing of applicants for promotion to certain positions at Customs Service); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug testing of certain railroad employees based on reasonable suspicion or occurrence of incident); *NTEU* v. *United States Customs Service*, 27 F.3d 623 (D.C. Cir. 1994) (random drug testing of persons with access to sensitive computer databases relating to drug interdiction); *International Bh'd of Teamsters* v. *Department of Transporta-*

United States therefore has a substantial interest in questions concerning the application of Fourth Amendment standards to drug testing programs. The United States participated as amicus curiae in *Vernonia School Dist. 47J* v. *Acton*, 115 S. Ct. 2386 (1995), and federal officials were parties to *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *NTEU* v. *Von Raab*, 489 U.S. 656 (1989).

STATEMENT

1. In 1990, Georgia amended its election laws by enacting Ga. Code Ann. § 21-2-140 (Michie 1993).[2] The statute provides that "[e]ach candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs." *Id.* § 21-2-140(b). Illegal drugs include marijuana, cocaine, opiates, or amphetamines, as well as phencyclidines except when used pursuant to a valid prescription or otherwise authorized by law. *Id.*

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tion, 932 F.2d 1292, 1307 (9th Cir. 1991) (drug testing of new motor carrier employees); *Willner* v. *Thornburgh*, 928 F.2d 1185 (D.C. Cir.) (drug testing of individuals offered jobs at Department of Justice as condition of employment), cert. denied, 502 U.S. 1020 (1991); *Hartness* v. *Bush*, 919 F.2d 170 (D.C. Cir. 1990) (drug testing of persons with access to secret national security information), cert. denied, 501 U.S. 1251 (1991); *NTEU* v. *Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (drug testing of agency's motor vehicle operators); *Bluestein* v. *Skinner*, 908 F.2d 451 (9th Cir. 1990) (drug testing of air traffic controllers), cert. denied, 498 U.S. 1083 (1991); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (drug testing of employees with "top secret" clearances), cert. denied, 493 U.S. 1056 (1990).

[2] The statute was precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, prior to its implementation.

§ 21-2-140(a)(3). The certificate must state that the candidate was tested within 30 days prior to qualifying for nomination or election to state office and that the results were negative. *Id.* § 21-2-140(c). Under the statute, the certification that the test was negative—which is the only information the statute makes available to the government—must be in a form approved by the Secretary of State from a laboratory listed by the commissioner of human resources. *Ibid.* The drug test is to be conducted "in a manner equivalent to that required by [U.S. Department of Health and Human Services Guidelines] or other professionally valid procedures approved by the commissioner of human resources." *Id.* § 21-2-140(a)(2). The statute applies to candidates for certain enumerated state offices in all three branches of government, including elected judges. *Id.* § 21-2-140(a)(4).

2. Petitioners were Libertarian Party nominees in 1994 for the offices of Lieutenant Governor, Commissioner of Agriculture, and member of the General Assembly. Pet. App. 2A. They brought this action in the United States District Court for the Northern District of Georgia in May 1994, claiming that the certification requirement violated their rights under the First, Fourth, Fifth, Ninth, Thirteenth, and Fourteenth Amendments, and also under the Georgia Constitution. They sought declaratory and injunctive relief barring enforcement of the statute.

Although the complaint alleged that the three petitioners were duly nominated candidates of the Libertarian Party for the general election in November 1994, Compl. ¶¶ 3-5, the complaint made no class allegations and did not allege that the plaintiffs intended to run for office in any future election. The complaint did allege that the Libertarian Party had

run candidates in the past and was the third largest party in Georgia, Compl. ¶ 6, and that petitioner Chandler had run as a Libertarian party candidate for Lieutenant Governor in 1990. Compl. ¶ 9. It appears that none of petitioners have run for any office for which drug testing is required since 1994, although elections for the General Assembly were held this year. See Ga. Const. art. III, § 2, ¶ 5 (two-year terms for members of the General Assembly). The next elections for Lieutenant Governor and Commissioner of Agriculture will not be held until 1998. See *id.* art. V, § 1, ¶ 3 (four-year term for Lt. Governor); *id.* art. V, § 3, ¶ 1 (four-year term for Commissioner of Agriculture).

3. On June 21, 1994, the district court denied petitioners' motion for a preliminary injunction, holding that the importance of the offices for which they were running and the relative unintrusiveness of the testing procedures made it unlikely that petitioners would succeed on the merits of their Fourth Amendment claim. Pet. App. 5B. All three petitioners apparently took the drug tests and filed the required certification, since all appeared on the ballot and unsuccessfully stood for election in November 1994. See *Special Section: Election '94 Georgia Races*, Atl. Journ.-Const., Nov. 10, 1994 (including vote tallies for two of three petitioners). After the 1994 election, the parties made a joint motion for entry of final judgment on stipulated facts, which the district court granted.

4. A divided panel of the court of appeals affirmed the district court's decision. The majority held that the drug tests required by the statute were searches, Pet. App. 3A, but that they were designed for purposes other the ordinary needs of law enforce-

ment, *id.* at 4A. The majority accordingly applied the balancing test articulated by this Court in *Skinner* and *Von Raab*, weighing the State's interests against the privacy interests of the persons subject to testing. *Ibid.*

Although there was no specific record of abuse among those subject to testing, the majority noted that unlawful drug use was "fundamentally inconsistent with high state office." Pet. App. 6A. The court explained that, because Georgians "place in the trust of their elected officials * * * their liberty, their safety, their economic well-being, [and] ultimate responsibility for law enforcement," *ibid.*, "those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use," *id.* at 7A. Moreover, the very nature of such high offices "demands the highest levels of honesty, clearsightedness, and clear thinking," which are inconsistent with drug use. *Ibid.* The majority outlined the statutory duties of the offices that petitioners sought, *id.* at 7A-8A, and concluded that those "positions are particularly susceptible to the 'risks of bribery and blackmail against which the Government is entitled to guard.'" *Id.* at 8A (quoting *Von Raab*, 489 U.S. at 674).

The majority viewed petitioners' privacy interests as less weighty than those in *Von Raab*, noting that the Georgia statute permitted petitioners to take the drug test at their own physician's office without auditory observation. Pet. App. 9A. As in *Von Raab*, the Georgia scheme requires the labs that perform drug tests under the statute to use HHS procedures, and the tests themselves reveal only whether illegal

drugs were used. *Id.* at 9A-10A. The court noted that if a candidate chooses not to file the results (and therefore not to run for office) after a positive test result, the positive result will never be made available to law enforcement offices; if the test is done at a private physician's office, no government agent will even know a test was conducted. *Id.* at 10A. Finally, the court noted that, as in *Von Raab*, petitioners' privacy interests were diminished: "candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position." *Ibid.* The court concluded that, on balance, "[b]ecause the governmental interests of the state of Georgia outweigh the intrusions on privacy effected by the challenged testing," the statute, as applied to petitioners, did not violate the Fourth Amendment. *Ibid.*[3]

Judge Barkett dissented. Pet. App. 20A-35A. She argued that the majority had not justified its assertion that this case involved special needs beyond the

[3] The court also held that, because the statute simply disqualifies a non-suspect class (*i.e.*, illegal drug users) from holding political office, it "does not improperly infringe on the rights of people to run and of voters to choose the candidate of their choice" in violation of the Equal Protection Clause. Pet. App. 12A. The court similarly rejected petitioners' argument that the statute violates the First Amendment because petitioners' refusal to submit to the drug tests "is itself a protected free speech act." *Id.* at 13A. Relying on *United States* v. *O'Brien*, 391 U.S. 367 (1968), the court held that the statute's regulation of conduct is valid because "it is generally within the power of the State of Georgia to prescribe qualifications for its elected officials," the statute furthers substantial governmental interests, the government's purpose is not to suppress free expression, and the regulation is no more restrictive of expression than necessary. Pet. App. 14A-15A.

normal need for law enforcement that would make obtaining a warrant impractical. *Id.* at 20A-22A. In her view, there was an insufficient nexus between the duties of the offices for which petitioners had run and the danger the State sought to avoid. *Id.* at 23A-27A. Judge Barkett also argued that the majority had not properly balanced the interests involved. She noted that, unlike the employees in *Von Raab*, petitioners seek to participate in public office, a right that the Constitution protects. *Id.* at 27A-28A. Judge Barkett also disagreed with the majority's First Amendment holding, contending that the statute "effectively bans from positions of political power not only those candidates who might disagree with the current policy criminalizing drug use, but also those who challenge the intrusive governmental means to detect such use among its citizenry." *Id.* at 29A.

SUMMARY OF ARGUMENT

Fourth Amendment principles for evaluating drug-testing programs based on special needs beyond the normal need for law enforcement are by now well established. The existence of a Fourth Amendment violation turns on a balancing test, in which the governmental interest in conducting drug testing under the particular program being challenged is weighed against the intrusion on individuals' legitimate expectations of privacy that would be caused by the challenged program.

This Court should reject the invitation of amici American Civil Liberties Union, et al., to revisit those settled principles. For example, amici propose a categorical approach under which drug testing violates the Fourth Amendment unless there is a "truly compelling" government interest aimed at "specific

and immediate threats" and the privacy rights of the person to be tested are "minimal." ACLU Br. 11, 8, 5. As the Court recently reaffirmed in *Vernonia*, however, there is no "fixed, minimum quantum of governmental concern" required by the Fourth Amendment. 115 S. Ct. at 2394. The relevant question under the Fourth Amendment is instead whether the governmental interest "appears *important enough* to justify the particular search" in light of the degree of intrusion on a genuine expectation of privacy that the drug testing program entails. *Id.* at 2394-2395. Depending on the opposing interests on each side of the balance, that standard can be satisfied in cases in which the threat is not "specific and immediate" and in cases in which the privacy rights affected by the program are not "minimal."

If the correct balancing approach is applied, the Fourth Amendment does not bar States from requiring candidates for certain top state elective offices to certify they have passed a drug test in order to qualify for the ballot. For example, a drug testing program may be supported by a State's interest in seeing to it that drug users not serve in high government positions with significant responsibility for law enforcement in general and for enforcement of the drug laws in particular. Because the Lieutenant Governor of Georgia must be able to take on such responsibilities when the Governor suffers a temporary disability or when the Governor's office becomes vacant, that interest is implicated in this case.

On the privacy side, candidates have limited expectations of privacy, given the intrusions on personal privacy that necessarily accompany campaigning for high office and the statutory requirements of

campaign disclosure. The Georgia drug testing procedures are based upon the Health and Human Services Guidelines, which this Court has held significantly minimize the intrusiveness of drug testing. Candidates know in advance that they will have to be tested, and they have some control over the timing of the test, which can be taken at their private physician's office. The remaining privacy interests are insufficient to outweigh the State's interests in conducting drug testing.

Because the United States does not require drug testing of candidates for any federal office, we express no views on the First Amendment questions presented by this case.

ARGUMENT

I. COMPELLED URINALYSIS DRUG TESTING FOR PURPOSES OTHER THAN LAW ENFORCEMENT IS REASONABLE UNDER THE FOURTH AMENDMENT IF THE GOVERNMENT'S IMPORTANT INTERESTS OUTWEIGH THE INDIVIDUAL'S PRIVACY EXPECTATIONS

A. Petitioners argue that the application in this case of Georgia's statutory requirement that a candidate seeking to qualify for nomination or election to high state office certify that he or she "has tested negative for illegal drugs," Ga. Code Ann. § 21-2-140(b) (Michie 1993), violates the Fourth Amendment.[4]

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[4] There is a substantial question whether any continuing controversy exists. Indeed, this case may have become moot while it was still in the district court. See *Brockington* v. *Rhodes*, 396 U.S. 41, 43 (1969). Petitioners appeared on the ballot (and were defeated) in the 1994 election, apparently by submitting to the contested drug-testing procedures. Thus,

It is not disputed that the certification requirement involves the sort of "state-compelled collection and testing of urine" that "constitutes a 'search' subject to the demands of the Fourth Amendment." *Vernonia*, 115 S. Ct. at 2390; see also *Skinner*, 489 U.S. at 617; *Von Raab*, 489 U.S. at 665. Nor is it disputed that there was sufficient state action to implicate the Fourth Amendment, since the drug tests, though they may be conducted by the candidate's private physician and a private laboratory,

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there remains no further controversy regarding that election. The Court has recognized that some challenges to election laws are capable of repetition yet evading review. *E.g.*, *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); *Norman* v. *Reed*, 502 U.S. 279, 287-288 (1992). This case, however, does not appear to fall within that category. The only plaintiffs in the case were the three petitioners; the Libertarian Party itself was not a party to the case. As to the three petitioners, the record indicates that petitioner Chandler ran for Lieutenant Governor in 1990 and 1994. Yet neither he nor either of the other petitioners have alleged that they intend to run for a covered state office in 1998, and neither court below made any finding on that question. Nor is it clear that this case qualifies as a dispute that would evade review if it arose again. If petitioners run for covered state offices again in the future, they may be able to obtain an adjudication on the merits of their challenge to the drug testing scheme if they act more promptly than they did here. In this case, for example, petitioners made no effort to obtain appellate review before the deadline for qualifying for the 1994 ballot or before the 1994 election itself. They did not appeal the denial of their request for a preliminary injunction, and they did not seek emergency relief from the court of appeals or this Court. Instead, they apparently decided to comply with the law in order to qualify for the 1994 election, after which they agreed to entry of judgment and appealed. Had they sought more prompt appellate review, they may have been able to obtain appellate review of their claim while there was still a live controversy.

are undertaken only because they are mandated by statute as a condition for qualifying for the ballot. *Skinner*, 489 U.S. at 614. See, *e.g.*, *Walter* v. *United States*, 447 U.S. 649 (1980); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921).

The Fourth Amendment does not require a warrant or individualized suspicion when a drug-testing program is based on "special needs, beyond the normal need for law enforcement." *Skinner*, 489 U.S. at 619-620. The validity of such a program depends upon a balancing of "its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia*, 115 S. Ct. at 2390; *Skinner*, 489 U.S. at 619. In any particular program, the question is not how strong the governmental interest is in isolation but instead whether that interest "appears *important enough* to justify the particular search" in light of the degree of intrusion on a genuine expectation of privacy that the program involves. *Vernonia*, 115 S. Ct. at 2394-2395. The government is not required to use "less drastic alternatives" if suspicionless drug testing is otherwise reasonable in the circumstances. See *Skinner*, 489 U.S. at 629 n.9.

B. Both petitioners (Pet. Br. 6-21) and amici American Civil Liberties Union, et al. (ACLU Br. 6-18) advocate limitations on suspicionless drug testing that are inconsistent with this Court's precedents.

1. Petitioners and the ACLU contend that suspicionless drug testing necessarily violates the Fourth Amendment unless the governmental interest is "compelling." Pet. Br. 10; ACLU Br. 6. Indeed, the

ACLU appears to reject a balancing test entirely.[5] It argues that the governmental interest in suspicionless drug testing must be "truly compelling" (ACLU Br. 11) and that the drug testing must be "aimed at *specific and immediate threats*." ACLU Br. 8 (emphasis added); see also Pet. Br. 7, 10. By "specific and immediate threats," the ACLU means "dangers" with the "immediacy" of "a speeding train, a nuclear power plant, a firearm." ACLU Br. 9.

The "compelling interest" and "specific and immediate threat" standards embody essentially the test articulated by the Ninth Circuit in *Acton* v. *Vernonia School Dist. 47J*, 23 F.3d 1514, 1526 (1994) ("it is not the type of potential disaster that has caused the Court or us to find a governmental interest compelling enough to permit suspicionless drug testing"); see also *ibid.* ("extreme dangers and hazards"); *id.* at 1524 ("truly serious concerns of a safety nature"); *id.* at 1524-1525 ("cases fraught with danger").[6] This Court, however, has rejected those standards.

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[5] Indicative of the distance between the ACLU's position and the Court's precedent is the ACLU's failure to mention the word "balancing" anywhere in its brief. Rather, the ACLU argues (ACLU Br. 4-5) that the Fourth Amendment contains a "strong presumption against suspicionless searches" which cannot be overcome unless the drug testing serves "compelling special needs" *and* unless the "privacy interests implicated * * * are minimal."

[6] Indeed, the ACLU's list of specific and immediate threats ("a speeding train, a nuclear power plant, a firearm") is almost exactly the same list that the Ninth Circuit believed was necessary to support drug testing. *Acton*, 23 F.3d at 1526 ("airplane or train wreck, or a gas pipeline or nuclear power plant disaster"). The ACLU adds "even a helmeted football player" to this list (ACLU Br. 9) in recognition of this Court's holding in *Vernonia*.

First, in *Vernonia*, the Court rejected the "compelling interest" standard, holding that there was no "fixed, minimum quantum of governmental concern" required by the Fourth Amendment. 115 S. Ct. at 2394. *Skinner* and *Von Raab* require application of a balancing test. Therefore, in order to justify a drug testing program, the governmental interest need not be "compelling"; it must simply "appear[] *important enough* to justify the particular search." *Id.* at 2394-2395.

Among the governmental interests this Court and the courts of appeals have deemed sufficiently important to justify a drug testing program are the interests in protecting health and safety, *Von Raab*, 489 U.S. at 668-671; *Skinner*, 489 U.S. at 628-629; safeguarding sensitive information—including but not limited to national security information, *Von Raab*, 489 U.S. at 677-678;[7] ensuring the integrity of the drug-interdiction and drug-abuse prevention process, *id.* at 668-670; see *Harmon*, 878 F.2d at 490-491; helping to deter drug use by students who participate in interscholastic athletics, *Vernonia*, 115 S. Ct. at 2395; and screening out drug users from government employment, *Willner*, 928 F.2d at 1192-1193 (noting the "considerable investment in terms of time and money whenever [the government] hires someone" and statistical evidence showing "an extremely high correlation between a positive result in a pre-

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[7] See also *NTEU* v. *United States Customs Service*, 27 F.3d at 627-628 (access to computer databases containing sensitive information regarding drug interdiction); *Harmon* v. *Thornburgh*, 878 F.2d at 491-492 (access to top secret information).

employment drug test and subsequent employment problems").

Second, the Court in *Von Raab* made clear that the threat—the danger feared by the government—did not have to be "immediate" in the sense the ACLU uses that term, that is, a threat of imminent catastrophic harm caused directly by a single error committed by a drug-impaired employee. In *Von Raab*, the Court held that the Customs Service could require drug testing for employees who handle "truly sensitive information." 489 U.S. at 677. See also *Harmon*, 878 F.2d at 491-492 (top secret information); *Hartness* v. *Bush*, *supra* (secret information); *NTEU* v. *United States Customs Service*, 27 F.3d at 628 (sensitive but unclassified information of use to drug smugglers). The potential harm that employees with access to classified or other sensitive information can cause by disclosing the information is extremely serious, but the harm typically takes longer to occur and depends on the operation of a longer causal chain than the ACLU wishes to permit. For instance, a drug-using employee with top-secret clearance could become strapped for cash and subject to bribery or blackmail. The employee could turn classified information over to others, and the harm from the disclosure may take months or years to occur. While that harm is not "immediate" in the sense contemplated by the ACLU, it is nevertheless sufficient, under *Von Raab*, to support suspicionless drug testing.

Finally, petitioners (Pet. Br. 9) and the ACLU (ACLU Br. 8) argue that there must be a showing that drug testing was instituted in response to a history of drug use, but *Vernonia* confirmed that no such showing is necessary. The Court noted that the

disciplinary problems in the Vernonia schools were "of greater proportions" than in *Skinner*, where the drug testing was upheld "without proof that a problem existed on the particular railroads whose employees were subject to the test," and "of much greater proportions" than in *Von Raab*, "where there was no documented history of drug use by any customs officials." *Vernonia*, 115 S. Ct. at 2395. By reaffirming in *Vernonia* that there was "no documented history of drug use" in *Von Raab*, the Court foreclosed the ACLU's argument here (ACLU Br. 8) that suspicionless drug testing cannot be upheld in the absence of "any record evidence * * * of a drug problem among the offices covered" by the statute. See *Von Raab*, 489 U.S. at 474-475; compare *id.* at 683-684 (Scalia, J., dissenting).

2. On the privacy side of the balance, petitioners argue that the drug testing to which they were required to submit was highly intrusive (Pet. Br. 16-19), and the ACLU goes further by arguing (ACLU Br. 5) that drug testing can never be required unless the privacy interests at stake are "minimal." That is not the correct standard. As with the governmental interest, there is no "fixed, [max]imum quantum" of intrusion on privacy that will be tolerated, *Vernonia*, 115 S. Ct. at 2394; a balancing test applies under *Skinner* and *Von Raab*, and even a significant intrusion upon privacy may be reasonable if the governmental interest is strong enough.

The privacy concerns ordinarily implicated by urinalysis drug testing are "negligible," *Vernonia*, 115 S. Ct. at 2393, when the procedures used in collecting and analyzing the urine samples are set up "to reduce the intrusiveness" of the process. *Skinner*, 489 U.S. at 626; see *Von Raab*, 489 U.S. at 672. The

privacy concerns are also minimized when the tests "look only for drugs," not for medication, and when "the results of the tests are disclosed only to a limited class of [officials] who have a need to know; and * * * are not turned over to law enforcement." *Vernonia*, 115 S. Ct. at 2393.

The ACLU contends (ACLU Br. 13-14) that the testing of urine in itself is an unacceptable invasion of privacy, and it objects to the collection procedures outlined in the Health and Human Services Guidelines. This Court has previously dealt with those very concerns. The Court has recognized that urinalysis drug testing implicates privacy concerns, *Skinner*, 489 U.S. at 617, but it nevertheless has upheld such testing in all three cases in which it was challenged. The fact that drug testing involves a search of urine is not a factor unique to the Georgia program; urinalysis, by definition, involves a search of urine. Similarly, the collection procedures under the HHS Guidelines, which the ACLU criticizes as "not appreciably lessen[ing] the nature of this intrusion" (ACLU Br. 14), were praised by this Court as "significantly minimiz[ing] the intrusiveness of the * * * drug-screening program." *Von Raab*, 489 U.S. at 673 n.2. The federal government uses the HHS Guidelines in all of its drug testing programs, and those Guidelines set the standard for protecting the privacy of employees undergoing drug testing.

II. STATES DO NOT OFFEND THE FOURTH AMENDMENT BY REQUIRING CANDIDATES FOR CERTAIN TOP STATE OFFICES TO CERTIFY THEY HAVE TESTED NEGATIVE FOR DRUGS AS A CONDITION OF QUALIFYING FOR THE BALLOT

Georgia requires anyone wishing to qualify as a candidate for high state office to submit a certification that within the past 30 days the candidate has passed a drug test. While the statutory list of the covered offices is extensive, this case concerns only three specific state offices—Lieutenant Governor, Commissioner of Agriculture, and member of the General Assembly. We will leave it to respondents to articulate the State's rationale for testing candidates for these three offices, but, in our view, some general considerations applicable to high state officials are legitimate factors upon which the State can rely on its side of the balancing test under the Fourth Amendment.[8]

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[8] This case also involves the scope of the States' authority to set qualifications for state office and regulate access to the ballot and the scope of the associational rights of candidates to run for elective office. Those issues have little to do with the privacy interests protected by the Fourth Amendment. Contrary to the dissenting judge below, see Pet. App. 27A-28A, we therefore believe that the presence of those issues has little impact on the Fourth Amendment analysis. Instead, those issues implicate interests protected by the First Amendment. See, *e.g.*, *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992) (in adjudicating challenges to state restrictions on ballot access, "the rigorousness of our inquiry * * * depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights"). As we noted above, because the United States does not require drug testing of candidates

A. States have an important interest supporting suspicionless drug testing of candidates for high state office. Like other governmental employers, States have an interest in "prevent[ing] the promotion of drug users to sensitive positions." *Von Raab*, 489 U.S. at 674. See also *Willner*, 928 F.2d at 1192 (drug testing of prospective federal employees); *International Bhd. of Teamsters*, 932 F.2d at 1307 (drug testing of prospective truck drivers). That interest is particularly strong when the sensitive position is a high political office whose holder has responsibility for law enforcement and for enforcement of the State's drug laws. Moreover, the State's interest in preventing the importation and distribution of illegal drugs "could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *Von Raab*, 489 U.S. at 670. A drug user's indifference to the mission of fighting drugs, "or, even worse, his active complicity with the malefactors," *ibid.*, can prevent the apprehension of those responsible for distributing drugs.

States vary on where they place principal law enforcement and drug enforcement responsibilities, but ordinarily the Governor and Lieutenant Governor have some supervisory and some direct responsibility. That appears to be the case in Georgia. The Lieutenant Governor by law takes on the responsibilities of the Governor when the Governor suffers a temporary disability, and succeeds to the office of Governor when that office becomes vacant. Ga. Const. art. V, § 1, ¶ 5; Ga. Code Ann. §§ 45-5A-2, 45-12-7 (Michie 1993). The

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for any federal office, we express no view on the First Amendment questions presented by this case.

Constitution vests in the Governor "[t]he chief executive powers" of the State," Ga. Const. art. V, § 2, ¶ 1, including the state constitutional right to "require information in writing from * * * all * * * officers and employees of the executive branch on any subject relating to the duties of their respective offices or employment," *id.* art. V, § 2, ¶ 10. The Governor's performance of his duties may have a vast impact on the state government and on the people of the State. Moreover, within the executive branch of state government are the Georgia State Patrol, see Ga. Code Ann. § 35-2-30 (Michie 1993), and the Georgia Bureau of Investigation, see *id.* § 35-3-2, both of which have substantial responsibility for law enforcement, including enforcement of drug laws.[9] See also *id.* § 35-2-1 (creating Board of Public Safety with policy-making authority). In addition, the Governor is the commander-in-chief of the state militia, *id.* § 38-2-110.[10] As commander-in-chief of the militia, the Governor may direct the Georgia National Guard to "assist and support federal, state, and local law enforcement

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[9] The Georgia State Police have general jurisdiction "to patrol the public roads and highways," and to "prevent, detect, and investigate violations of the criminal laws of this state, any other state, or the United States which are committed upon these roads and highways or upon property appertaining thereto." Ga. Code Ann. § 35-2-32 (Michie 1993). The Georgia Bureau of Investigation is an investigative agency that employs, *inter alia*, "narcotics agents" with responsibility to "detect and apprehend violators of the criminal statutes of [Georgia] pertaining to the possession, sale or use of narcotics or other dangerous drugs." *Id.* § 35-3-9.

[10] The Governor has the authority to call out the militia to execute state laws, Ga. Code Ann. § 45-12-27 (Michie 1993), to put down insurrection, *id.* § 45-12-28, and to prevent violence and disorder, *id.* § 45-12-31.

agencies in drug interdiction, counterdrug activities, and drug demand reduction." *Id.* § 38-2-10(a)(1). He may also authorize the use of the Georgia National Guard outside the state if requested by another governor as part of a federally approved counterdrug law enforcement plan. *Id.* § 38-2-11(b).[11]

B. The privacy interests implicated by Georgia's scheme are not significantly different from those in *Skinner*, *Von Raab*, or *Vernonia*, and in certain respects they are less weighty. Under Georgia law, the drug testing is conducted "in a manner equivalent to that required by [U.S. Department of Health and Human Services Guidelines] or other professionally valid procedures approved by the commissioner of human resources." Ga. Code Ann. § 21-2-140(a)(2) (Michie 1993). The HHS Guidelines are the same rules that governed the procedures used in *Skinner* and *Von Raab*, and they "significantly minimize the

[11] In Georgia, the Commissioner of Agriculture has primarily regulatory responsibilities, Ga. Code Ann. § 2-2-7 (Michie 1993), but the Commissioner is also given the authority to conduct administrative inspections pursuant to a judicial warrant. *Id.* § 2-2-11. Ordinarily, inspections are to be conducted in the presence of the owner or occupant of the place to be searched without forcible entry, but the judicial officer issuing the warrant "may expressly authorize a forcible entry" based on a showing of a violation of a law administered by the Commissioner posing an immediate threat to health or safety or a showing that reasonable attempts to serve a previous warrant were unsuccessful. *Id.* § 2-2-11(4). The responsibilities of a member of the state's House of Representatives include passing legislation relating to crime and law enforcement. To that end, a member of the legislature may well serve on committees or otherwise engage in legislative investigation and oversight with respect to the State's law enforcement activities, including its efforts to combat drug trafficking.

intrusiveness" of the drug-screening program. *Von Raab*, 489 U.S. at 673 n.2. Requiring the production of a urine sample under these procedures "simulates what is a common medical procedure, an accepted part of a typical physical examination." *Willner*, 928 F.2d at 1189.

The intrusiveness of the process is further minimized by the prospective candidate's advance knowledge of the testing requirement and his or her ability, within limits, to select a time to undergo the testing at the office of a personal physician. In *Von Raab*, the Court found it a significant limit on the program's intrusion on privacy that "applicants know at the outset that a drug test is a requirement" of the positions to which they are applying, and that they are "notified in advance of the scheduled sample collection, thus reducing to a minimum any 'unsettling show of authority' that may be associated with unexpected intrusions on privacy." 489 U.S. at 672 n.2 (citation omitted); see also *Willner*, 928 F.2d at 1189-1190 (testing of federal job applicants who have received a tentative offer of employment).

The ACLU nevertheless contends (ACLU Br. 17) that the advance notice given to a candidate does not indicate "a lower expectation of privacy." But as *Von Raab* demonstrates, that is not the law. Although the ACLU is correct (ACLU Br. 17) that the government ordinarily "cannot avoid the dictates of the Fourth Amendment simply by giving notice of an impending intrusion," no one has suggested that advance notice is all that is required. Rather, advance notice is simply one factor that tends to diminish the individual's privacy expectations.

For their part, petitioners argue (Pet. Br. 19) that the drug testing program is likely to be "ineffective"

because a candidate who used drugs could avoid detection simply by abstaining from drug use long enough to produce a negative drug test on the date chosen by the candidate (but within 30 days of the election) for the drug test. But as the Court explained in *Von Raab*, that objection is to a feature of the program that "contribute[s] significantly to diminish the program's intrusion on privacy" and "under petitioners' view, 'the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy.'" 489 U.S. at 676 n.4 (citation omitted). Moreover, since a person's "pattern of elimination for a given drug cannot be predicted with perfect accuracy," "the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those * * * who venture to attempt them." *Id.* at 676. Petitioners themselves concede (Pet. Br. 19) that some drugs stay in the blood stream for up to 22 days and that Georgia's drug testing "may detect drugs in the worst of addicts of the more addictive drugs (e.g. heroin) who can not stop using the drug for even a short time." Thus, the court of appeals in this case correctly noted that "[p]ersons who would be caught by Georgia's limited testing would seem to be people who are out of control about drugs; these worst cases might be the most dangerous in public office." Pet. App. 18A-19A n.4.

Other factors also limit the candidates' privacy expectations. Individuals who choose to participate in a campaign for high office often "voluntarily subject themselves to a degree of regulation" higher than that applicable to the general public. *Vernonia*, 115 S. Ct. at 2393. "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.

He runs the risk of closer public scrutiny than might otherwise be the case." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). In particular, Georgia law requires disclosure of campaign contributions, Ga. Code Ann. § 21-5-30 (Michie 1993), and also has extensive financial disclosure requirements, *id.* § 21-5-50, which candidates must comply with 15 days after qualifying for the ballot. The ACLU dismisses those limitations on privacy expectations by arguing (ACLU Br. 16) that financial disclosure is less intrusive than the drug testing itself, which is a "[v]iolation[] of bodily integrity." The significance of the disclosure requirements, however, is that they diminish privacy expectations, not that they involve the same type of intrusion as a drug test. The Court has already held that non-bodily intrusions—such as FBI background investigations—may "diminish [individuals'] expectations of privacy in respect of a urinalysis test." *Von Raab*, 489 U.S. at 677.[12]

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[12] The ACLU argues (ACLU Br. 16 n.11) that "a decrease in privacy expectations may not be justified by the prevalence of applicant testing among large private employers," because "the Fourth Amendment's constraints do not apply to the private sector." It is of course indisputable that the Fourth Amendment does not limit private conduct. Nonetheless, the fact that drug testing of persons seeking employment is a common practice in the private sector is an indication that society does not consider such testing to be an unreasonable invasion of privacy. *Willner*, 928 F.2d at 1191-1192 (citing *O'Connor* v. *Ortega*, 480 U.S. 709, 732 (1987) (Scalia, J., concurring in the judgment)). Given that the size of private-sector employment in this country vastly exceeds that of public-sector employment, the privacy expectations of a prospective employee (whether private or public) may well be affected by "the prevalence of applicant testing among large private employers." See, *e.g.*, *Willner* v. *Thornburgh*, 928 F.2d

CONCLUSION

To the extent the case is moot, it should be dismissed. Otherwise, if the Court reaches the merits of the Fourth Amendment issue, it should hold that States do not offend the Fourth Amendment by requiring candidates for certain top state office to certify they have tested negative for drugs as a condition of qualifying for the ballot.

Respectfully submitted.

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at 1185; David Lockard, *Protecting Medical Laboratories from Tort Liability for Drug Testing*, 17 J. Legal Med. 427, 427 (1996).